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Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No. 787

ILLINOIS COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION (OF INDIANA), BOARD OF TRADE CITY OF CHICAGO, AND ACME STEEL COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE ALTON RAILROAD COMPANY, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE ALTON RAILROAD COMPANY AND OTHER CARRIERS, APPELLEES

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Chicago, Illinois
April 23, 1934.

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OPINIONS.

The decision of the specially-constituted District Court (R. 1306), *Illinois Commerce Commission, et al.* v. *United States, et al.*, dismissing the bill is not reported but appears at pages 1306-1316 of the record. The reports and orders of the Commission (R. 33 and 137) entitled No. 19610 *Switching Rates in Chicago Switching District* are published in 177 I. C. C. 669 and 195 I. C. C. 89.

STATEMENT.

This is an appeal from a final decree of the court below, denying the prayer in the Bill of Complaint to enjoin, set aside, annul, and suspend the order entered July 3, 1933, by the Commission in said proceeding entitled No. 19610 *Switching Rates in the Chicago Switching District,* wherein the Interstate Commerce Commission, under the provisions of Section 13 of the Interstate Commerce Act, found that the state rates result, and will for the future result, in unjust discrimination against interstate commerce.

The carrier appellees contend and urge that the sole issue in this case is whether the Interstate Commerce Commission, in this proceeding, had sufficient evidence before it under the provisions of Section 13 of the Interstate Commerce Act to justify its finding. If this contention is correct, the issues raised by the appellants as to the reasonableness of the interstate rates fixed by the Commission in this proceeding, the various criticisms of the appellants of the cost study, the assertion that the record upon which the Commission decided the reasonableness of the rates was stale, and numerous other subsidiary and collateral contentions, may be disregarded.

Rates involved.

The rates considered and covered by the Commission's report and order are those applicable to traffic that has its origin and destination within the Chicago switching district. Said rates do not apply in connection with switching of traffic that moves into the district from outside, or in connection with traffic that originates in the district and moves to points outside of the district.

Chicago switching district.

The Chicago switching district lies wholly within joining sections of the States of Illinois and Indiana and is a homogeneous territory comprising over 600 square miles; it is densely populated and is gridironed by a network of railway tracks; it is served by thirty-five steam railroads engaged in interstate commerce. There are more than 5,000 miles of track within the boundary of the Chicago switching district (R. 675). The district is approximately 40 miles in length and from 7 to 15 miles wide. In 1911, the industries with private sidetracks numbered 1,910; this number has since increased to more than 4,500. There is also a large number of small manufacturers and distributors who do not have private sidetracks (R. 534). Exhibits 6 and 15 (R. 458, 535) give a map picture of the district. It is geographically defined in Appendix A of the Commission's report in 177 I. C. C. 669 (R. 76). Such a district is deemed essential to the commercial development of Chicago and to the cities within the Chicago switching district (R. 534-543).

Prior to 1911, there was no definite boundary of the Chicago switching district; each carrier serving the district published individual switching rates; there were no joint rates for movement from an industry on one railroad to an industry on another railroad; individual tariffs were made according to local conditions surrounding that road; it was impracticable for shippers who had traffic to move to ascertain what charges would be made. The situation was described as chaotic (R. 767). The shipping interests were dissatisfied with shipping conditions. Chicago felt that its prestige as a commercial center was severely handicapped by reason of the chaotic condition that existed. As a result, the shippers and carriers had numerous conferences in 1910, the result of which was the publishing of

tariffs (in August, 1911) fixing definite boundaries of the Chicago switching district, and establishing single and joint line rates on an all-commodity basis (R. 768).

History of Proceeding before the Commission.

Prior to May 11, 1927, the all-commodity basis of rates applying within the Chicago switching district was jeopardized by an order of the Interstate Commerce Commission in Docket 15110, *Jones & Laughlin Steel Corporation* v. *B. & O. R. R.*, 96 I. C. C. 682. The effect of the order in the *Jones & Laughlin Steel Corporation* case, if complied with, would have required a departure from the all-commodity basis of rates on iron and steel articles within the Chicago switching district (R. 472).

By an all-commodity basis is meant that the same rate applies to all commodities, irrespective of size, character of commodity, distance it travels, and its value. In substance, is a blanket rate. In the instant case, the 3-cent rate for a single-line movement was prescribed by the Interstate Commerce Commission to apply within the Chicago switching district on all commodities, regardless of the distance they moved and regardless of the character of the commodity.

With a view to preserving the all-commodity basis of rates that had been in effect since 1911, a number of conferences of the shippers within the Chicago switching district, the carriers, and representatives of the Interstate Commerce Commission, were had. As a result of such conferences, a basis of rates on all commodities, including iron and steel articles, within the Chicago switching district, was suggested and the carriers forthwith filed with the Interstate Commerce Commission, the Illinois Commerce Commission, and the Public Service Commission of Indiana, such suggested rates. These rates were suspended

by the respective commissions and as a result, the Interstate Commerce Commission, on May 11, 1927, instituted its Docket 19610 *Switching Rates in the Chicago Switching District,* and promulgated same to all interested parties, including the State of Illinois and the State of Indiana (R. 674). Docket 19610 was an inquiry and investigation by the Commission, upon its own motion, concerning the lawfulness of all rates and charges for the switching within the Chicago switching district, of all carload traffic moving in interstate commerce, and their relation to like rates and charges for switching in intrastate commerce, with a view to prescribing such reasonable, proper, nondiscriminatory, nonprejudicial, and otherwise lawful switching rates for said traffic, as the facts and circumstances appeared to warrant (R. 38).

Thereafter extensive hearings were conducted jointly by the Interstate Commerce Commission, the Illinois Commerce Commission, and the Public Service Commission of Indiana. Throughout the joint hearings before the Interstate Commerce Commission and the two state commissions, the Chicago Shippers' Conference Association, an organization representing all shippers within the Chicago switching district; the Chicago Association of Commerce, an organization to promote and protect the interests of Chicago; and individuals, industries, and shippers, contended for an all-commodity basis of rates to apply within the Chicago switching district, state and interstate alike. At no time throughout the several hearings, or in brief or oral argument, did any party of record take the position that a different rate should apply on state traffic within the district than at the same time applied on interstate traffic. The sole question in controversy was the measure of the rates to apply upon the traffic moving within the Chicago switching district. Preliminary to these cooperative hearings, the carriers were directed and required by

the Interstate Commerce Commission to make a cost study (R. 41).

During the course of the hearings in order to conserve time, to produce a more complete record, to make clear the issues, and to record disputed questions of fact, direction was given to the litigants to form a committee consisting of a representative of the Illinois Commerce Commission, a representative of the Public Service Commission of Indiana, a representative of the shippers, and a representative of the carriers; such committee was appointed. A study was made of all issues involved and the facts relating to such issues, and the work of such committee was promulgated in exhibit form and made a part of the record as Exhibits 83 and 84 (R. 761). All points involved in the cost study were tabulated, and wherever there was a disagreement, each party would set forth his facts and argument in support of his contention. The case was briefed by all interested parties and oral argument was had before the full commission, the Illinois Commerce Commission and the Public Service Commission of Indiana sitting with the Interstate Commerce Commission for the purpose of argument. On July 31, 1931, the Commission issued its report and order (177 I. C. C. 669, R. 33) and the two state commissions, on August 26, 1931, issued their separate reports and orders (R. 255, 343).

In its report and order of July 31, 1931, the Commission found (R. 76):

> "That the rates proposed of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more-line hauls, carload, minimum 60,000 pounds within the Chicago switching district as defined in Appendix A will not be unreasonable for the future for application on all of the commodities switched within the district, except railway equipment on its own wheels."

In the last paragraph on page 711 of its report in 177 I. C. C. 669 (R. 75) the Commission stated:

> "A large percentage of the traffic under consideration is intrastate in character, but the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements. In the hope that both the Illinois Commerce Commission and the Public Service Commission of Indiana will bring their rates in harmony with the conclusions herein, no specific finding or order with regard to intrastate rates will be entered at this time."

The order of the Commission, of July 31, 1931, was to be effective November 10, 1931. Said date was subsequently changed to December 10, 1931, on which date the rates above quoted became effective on *interstate* traffic within the Chicago switching district. On August 26, 1931, as heretofore stated, the Illinois Commerce Commission and the Public Service Commission of Indiana denied the carriers the right to make effective on *intrastate* traffic, within the Chicago switching district, in Illinois and in Indiana, the rates found reasonable by the Interstate Commerce Commission for interstate application within said district.

On September 10, 1931, the carriers filed with the Interstate Commerce Commission a petition seeking appropriate findings and order authorizing and requiring them to establish and apply the same rates to intrastate traffic, within the Chicago switching district, within Illinois and within Indiana, as were found lawful and reasonable for interstate application within the same district, and to have the rates effective concurrently with the effective date of the interstate rates within the district (R. 139). The Commission denied said petition in so far as making such an order upon the record already made, but did, on November 2, 1931, reopen the proceeding in Docket 19610 for further

hearing with respect to the relation of rates and charges for switching in intrastate commerce to the rates prescribed for like switching in interstate commerce, within the Chicago switching district, and for the purpose of determining whether the adjustment of interstate and intrastate rates and charges was unduly prejudicial to interstate shippers and traffic, and unduly preferential of intrastate shippers and traffic, or unjustly discriminatory against interstate commerce, in violation of Section 13 of the Interstate Commerce Act, with a view to the entry of such order, or orders, as might be necessary to correct such violation, or violations, as might be found to exist (R. 139).

On December 28, 1931, complaint was filed by the Acme Steel Company and fifty-seven other individuals, corporations and associations, with the Interstate Commerce Commission, attacking the lawfulness of the said increased interstate switching rates which became effective on December 10, 1931. Said complaint was docketed as No. 24950. Reopened Docket 19610 and said complaint, Docket 24950, were assigned for hearing at the same time and place, before the same examiners. The two cases were heard separately and briefed separately, but the issues were consolidated in one proposed report (R. 139). At the hearing in reopened Docket 19610 and the hearing in Docket 24950, the Illinois Commerce Commission, the Public Service Commission of Indiana, and the complainants in Docket 24950, protestants in reopened Docket 19610 (appellants here) offered evidence in an endeavor to show that the interstate rates within the Chicago switching district were unreasonable. Evidence was submitted in support of allegations that the cost study was defective, conditions had changed, and there was a diversion of traffic to other forms of transportation (R. 140). Virtually all grounds urged in the Bill of Complaint were presented and

urged before the Commission. Exceptions were filed to the proposed report and the case was orally argued before the Commission. The Commission consolidated the two dockets in one report and on July 3, 1933, issued its report and order (195 I. C. C. 89, R. 137), in which report and order it dismissed the complaint in Docket 24950, and ordered (R. 168a):

> "That respondents herein, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist on or before September 20, 1933, from practicing the unjust discrimination found in said report to exist in relation to interstate and intrastate all-commodity switching rates and charges for transportation in switching service in the Chicago switching district within the States of Illinois and Indiana."

The Commission further ordered (R. 168b):

> "That said respondents according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before September 20, 1933, and thereafter to maintain switching rates and charges on an all-commodity basis for switching service in intrastate commerce in the Chicago switching district within the States of Illinois and Indiana which shall be not less than the rates contemporaneously applied by said carriers to the transportation by them of all commodities in interstate switching service between points in the Chicago switching district in the States of Illinois and Indiana."

On August 15, 1933, the appellants herein filed with the Commission a joint petition for reopening said proceedings in Dockets 19610 and 24950 and asked for further hearing; for setting aside of the order of July 3, 1933; for reargument and/or reconsideration of said report and order of July 3, 1933. Said petition was denied October 4, 1933 (R. 139). The carriers, appellees herein, filed ap-

propriate tariffs establishing the rates authorized by the Interstate Commerce Commission in its order of July 3, 1933, effective November 20, 1933.

Facts of record.

Parties appearing before the Commission in the hearings in Docket 19610, in the hearing in reopened Docket 19610, and in the hearing in Docket 24950, requested an all-commodity basis of rates within the Chicago switching district, for application alike on intrastate and interstate traffic. Not a single interest requested or advocated a different rate on state traffic than at the same time applied on interstate traffic. The contention throughout the hearings in the reopened Docket 19610 and in Docket 24950 was that the interstate rates were too high and should be reduced to a reasonable basis; that when a reasonable basis was established for interstate traffic such basis should also apply on state traffic. (R. 62, 75, 475, 533, 534, 535, 536, 538, 541, 542, 548, 549, 555, 565, 608, 617, 618, 651, 653, 655, 656, 659, 700, 709, 848, 849, 857, 868, 1140, 1219, 1277, 1278.)

State and interstate traffic handled alike.

The evidence before the Commission showed that the services rendered in performing intrastate switching and in performing interstate switching within the district are alike and of the same character; that cars are handled both in state and interstate switching by the same train, by the same crew, through the same yards, and at the same time. The evidence showed that the trains handling the traffic within the Chicago switching district, the manner of assembling and operating the trains, and the manner of handling carload freight, were comparable to the handling of similar freight in road-haul service; that each transfer train handling the shipments from one point in the dis-

trict to another point in the district consisted of an engine and a caboose, the same as for road haul. The air had to be connected and in operation and all of the safety appliances that are required in connection with road haul were required in the handling of switching business within the Chicago switching district. All these services are performed by the carriers whether the traffic is state or interstate (R. 956-965). Appellants admitted that the switching movements within the Chicago switching district are performed in substantially the same manner as road-haul movements and that state and interstate traffic within the district is handled in the same trains and that there is no disinction made between the handling of state and interstate traffic (R. 1002).

Same commodities move in state and interstate commerce.

The evidence of record shows that the same commodities move in state traffic as move in interstate traffic; that industries located within the district on either side of the Illinois-Indiana state line manufacture the same or similar commodities as move between points in the district, and that such industries ship both state and interstate within the district. The record shows that large steel industries, large oil refining companies and other manufacturing companies are located within the district, on both sides of the state line. (Exhibits 11-A, 11-B, 110; R. 75, 866, 1048, 1052, 1053, 1069, 1070, 1082, 1083, 1134, 1135, 1136, 1144.)

History and comparison of rates.

The record shows the history of the rates within the Chicago switching district, their origin and changes. Comparisons of rates with rates in other switching districts throughout the country were made. A number of witnesses gave testimony and filed numerous exhibits com-

paring the rates established by the Interstate Commerce Commission for application within the Chicago switching district with rates for line-haul service, with switching rates, and also with rates established by the Interstate Commerce Commission in other cases. (R. 547, 548, Ex. 18; R. 542, 553, 556, 597, Ex. 39; R. 604, Exs. 43, 44; R. 605, Ex. 45; R. 606, Exs. 46, 47, 48; R. 607, 660, Ex. 56; R. 858, 859, 893, 894, 895, 896, 897, 898, 899, 1053, 1054, 1163, 1164, 1165, 1167, 1168, 1169, 1170, 1228, 1229, 1300, 1301, 1302, 1303.)

Competition.

The evidence of record shows that the Illinois-Indiana state line runs north and south through the Chicago switching district (Exhibits 6 and 15, R. 458, 535). In handling interstate traffic within the Chicago switching district, this state line is crossed. Some of the railroads cannot move traffic from an industry located on the Indiana side of the line to an Indiana destination within the district without operating across the state line in Illinois; likewise, some of the roads cannot move traffic from an industry located on the Illinois side of the line, within the district, to a destination within Illinois, within the district, without crossing the state line. Some of the railroads have a number of assembly yards and interchange tracks that are located nearby the state line, and in some instances overlap the state line (R. 1068). The record further shows that there are many industries located on either side of the state line, within the Chicago switching district, that compete one with the other (R. 1081). The location of some of the industries and the competition referred to by the witnesses will be found at the following pages of the record: (R. 549, 559, 571, 584, Ex. 35; R. 587, 601, 608, 615, 701, 742, Ex. 72; R. 965, 1054, 1057, 1068, 1069, 1070, 1071, 1074, 1075, 1082, 1083, 1135, 1142, 1218, 1230).

Volume of traffic.

The record shows that the number of carloads of traffic handled between points within the Chicago switching district for the month of September, 1926, was 42,666 cars; of this number, 17,194 cars moved in interstate commerce; 22,743 moved in intrastate commerce in Illinois; and 2,729 moved intrastate in Indiana. Of this total traffic, 40.29 per cent was interstate; 53.31 per cent was intrastate Illinois; and 6.40 per cent was intrastate Indiana (R. 43). The record shows that that portion of the State of Indiana lying within the Chicago switching district is but a small portion of the district. Exhibit 6 (a map of the Chicago switching district) shows the district as a whole, that portion of the district that lies within Indiana, and that portion of the district that lies within Illinois (R. 1343). The record shows that while 10.3 per cent of the Chicago switching district lies within Indiana and 89.7 per cent of the area of the district lies within Illinois, yet over 40 per cent of all the traffic that moved interstate within the district had its origin or destination within that portion of the State of Indiana within the district. The record shows (Exhibits 11-11A) the movement of the cars within the district, separated as between single-line, two-line, and three-or-more-line movements. The record further shows (Exhibit 11A, 99A) the commodities that moved in each of the 42,666 cars, the weight and the rates charged, and the revenue collected.

Loss of revenue.

The evidence of record shows that for interstate application the Commission established a rate of 3 cents per 100 pounds for single-line hauls; 3.5 cents for two-line hauls; and 4 cents for three-or-more-line hauls; minimum 60,000 pounds. That by reason of the refusal of the Illi-

nois Commerce Commission and the Public Service Commission of Indiana to permit the carriers to place the rates in Illinois and Indiana, within the district, on the same basis as the interstate rates, a lower basis of rates applied on intrastate shipments within Illinois and within Indiana, within the district, than applied on interstate shipments. These lower rates were 2.5 cents per 100 pounds for one or two-line hauls; 3 cents for three-or-more-line hauls; minimum 60,000 pounds. The record further shows that by reason of the lower state rates within Illinois and within Indiana, in the Chicago switching district, and between the district and Chicago Heights, based on normal tonnage of September, 1926, the carriers would lose, on an annual basis, $2,864,957 (Exhibits 99-A, 100-A) that based on the tonnage of a week in November, 1931, the carriers would lose on an annual basis $1,057,521 (Exhibits 101-A, 102) and based on the tonnage of a week in January, 1932, these carriers would lose $1,043,160 (Exhibits 103-A, 104) (R. 164).

Lower state rates cause interference with or blockading of interstate commerce.

The record shows that because of the lower intrastate rates within the Chicago switching district, shippers were routing their shipments over state routes (Exhibit 110, R. 951-2). The record discloses that the normal and customary routes for such shipments, between points within the Chicago switching district are interstate routes. The record shows that between December 10, 1931, and March 31, 1932, 856 cars moved over intrastate routes, when the normal and customary routes of such cars were interstate routes. The requirements and demands of the shippers to so handle their shipments as to protect the lower state rates, interfered with the normal and customary manner of handling business within the Chicago

switching district and required one of the carriers alone to perform 8½ engine hours per day over and above what would have been required if the shipments were handled over interstate routes within the district (R. 981). The record shows that the switching cost only was materially greater in handling the cars via state routes in order to protect the shipper's request for state movement. The actual switching cost on one of the movements illustrated in Exhibit 110 was as follows: if the car had moved over the natural, ordinary and customary route, it would have moved interstate and the switching cost alone for that movement would have been $10.44, but in order that the shipment might be moved wholly within the State of Illinois, the switching cost alone, over the route actually traversed by the car, in order to take advantage of the lower state rate, was $21.78 (R. 955). The demands of the shippers to route their traffic within the district over state routes were due to the fact that the state rate was .5 cents per 100 pounds lower on one-line hauls, 1 cent lower on two-line hauls, and 1 cent lower on three-or-more-line hauls, minimum 60,000 pounds, than were the interstate rates.

The evidence of record discloses that after the interstate rates became effective, December 10, 1931, there was a diversion of traffic from interstate to state movement. The record shows (R. 162) that for one, two and three-or-more-line hauls within the Chicago switching district, in Illinois, for one week (November 9-15, 1931), prior to the effective date of the interstate rates, the percentage of traffic handled intrastate to the whole was 35.39 per cent; while for one week (January 11-17, 1932) subsequent to the effective date of the interstate rates, this percentage was increased to 38.63 per cent. The corresponding figures for traffic moving in Indiana, within the district, were 7.08 per cent prior to the effective date of the interstate

rates, and 8.12 per cent subsequent to the effective date. The percentage of the interstate traffic shows the reverse: for that period prior to the effective date of the interstate rates, the interstate traffic moving within the district was 57.53 per cent of the whole; subsequent to the date the interstate rates became effective, this percentage dropped to 53.25 per cent. The diversion of traffic from interstate to state was to a greater extent between Chicago Heights and the Chicago switching district. Prior to the effective date of the interstate rates, the intrastate traffic was 52.93 per cent, while after the effective date of the interstate rates, this percentage had increased to 71.38 per cent. The percentage of interstate traffic shows the reverse: for the period prior to December 10, 1931, the interstate percentage was 47.07, while for the period subsequent to December 10, 1931, this percentage had shrunk to 28.62 per cent (R. 162).

Cost study.

The evidence of record shows that by notice of October 25, 1926, the Commission required the carriers to make a cost study covering the movement of traffic within the Chicago switching district (R. 41). This request on the part of the Commission also required that the carriers submit statistics relating to the shortest, longest and average haul, also commodities embraced in the 69 classes provided for in the carriers' annual reports to the Commission. Pursuant to this request, the required statistics were compiled on 42,666 cars that moved in the month of September, 1926. The cost study was based on the Coverston-Saur Formula and the study covers carload movements only. The formula segregates the expenses incurred into three general classes, namely: clerical, switching, and car detention or maintenance. Taxes and return on investment are provided for by the employment

of an estimated ratio, referred to as an operating ratio,* and used as a divisor to expand the determined cost so as to embrace those elements. The study was applied to 15 railroads operating within the Chicago switching district. Seven of the railroads are trunk lines and eight are switching and terminal companies (R. 41). Of the 42,666 cars that moved within the Chicago switching district during the month of September, 1926, 26,166 moved in connection with the 15 study roads, or 61.33 per cent of the total cars handled for the month of September, 1926, were cars studied (R. 42, Ex. 7).

Exhibit 6, a map of the Chicago switching district attached as appendix to this brief shows in red the railroads that were involved in the cost study. This shows the representative character of the roads involved in the cost study.

In order to determine the engine-hour costs, a test period of one week, for each of the study roads, was taken. These periods were during that part of the year 1927 between June and October. The exact periods are shown in Exhibit 7 (R. 459). During the test periods the study roads handled an aggregate of 63,586 cars per day, while for the calendar year 1927, they handled an average of 62,460 cars per day, a difference of about 2 per cent. The cost developed in accordance with the formula, based on the test periods of 1927, was applied to the traffic that moved during the month of September, 1926. The formula used is Exhibit 5 (R. 456). On page 9 of this exhibit, the basic, fundamental principle of the formula following the list of twelve general elements of service, and which are subject to further division into sub-elements, is:

"To ascertain the cost of a given kind of switching service, in any terminal, it is necessary first, to deter-

*Operating ratio is the percentage relation of total operating expenses to total operating revenue.

mine the average cost per car for each of the foregoing elements of service, and second, to know what different elements of service are given to the cars under review."

Out of about 2,000 switching crews working per day in the Chicago switching district, 1,118 engine conductors reported for a seven-day period, and the total number of units of cost so developed was 4,710, of which 2,332 were used to develop 6,510 different combinations of units designated as index numbers (R. 459). The unit costs were applied to a total of 26,166 cars, divided as follows: 11,950 single-line hauls; 11,483 two-line hauls; and 2,733 three-or-more-line-hauls (R. 42, Ex. 7; R. 460).

The record shows that due to the world-wide depression, there had been a substantial decrease in tonnage since the cost study was made and since September 21, 1928, the day that the record in the original hearing in Docket 19610 was closed. The decrease in tonnage resulted in an increase in unit costs due to the fact that units of traffic greatly decreased without any opportunity to reduce operating expenses correspondingly, on account of the irreducible minimum having been reached (R. 145). The evidence shows that the operating expenses per car handled increased from $3.68 in 1928 to $4.04 in 1931 (R. 146). The evidence further shows that the total operating revenues for nine switching carriers, for the year 1931, were approximately $10,500,000 less than for the year 1928; whereas the total operating expenses for the same roads, in 1931, were only $5,500,000 less than in 1928. The record shows that the operating ratio of the eight switching lines included in the cost study had increased from 66.97 per cent in 1928 to 74.11 per cent in 1931 (R. 146).

The record further shows that the decline in the number of cars handled by the seven trunk lines involved in the cost study, for their entire system, serving practically all portions of the United States, from 1928 to 1931, was 32.29 per cent, while the cars handled by the eight switching lines involved in the cost study declined but 28.47 per cent (Exs. 107 and 108). This indicates a less falling-off of traffic in the Chicago switching district due to decline in traffic, than for the country as a whole. The record further shows that a switching cost study made in 1928 in Evansville, Indiana, and brought into review by the Public Service Commission of Indiana, produced a cost of $7.90 per loaded car; a new cost study of the same terminal was made in 1931 and resulted in a cost of $12.17 per loaded car (R. 1171).

The record shows that generally, all parties favored an all-commodity basis and practically all parties were of one accord that one level of rates should apply throughout the district in both interstate and intrastate movements. Switching charges differ from line-haul rates in that they are ordinarily not graded in accordance with either the value of the commodity moved or the distance of the movement. Switching rates partake somewhat of the nature of a postage stamp basis. The average miles of one-line, two-line and three-line hauls, within the district, both state and interstate, necessarily differ because of the fact that the interstate includes the district as a whole while the intrastate is only a portion of the whole.

The record shows that of the twelve or more elements used in determining the cost of switching, the element of distance, as exampled in the transfer service, plays the least important part. The record shows, by computations from Exhibits 90 and 91, that of the four railroads in the Chicago switching district that cross the state line, namely, the Baltimore & Ohio Chicago Terminal Ry.; El-

gin, Joliet & Eastern Ry.; Indiana Harbor Belt Ry.; and the Pennsylvania Railroad—all four of which were used in the cost study—on interstate traffic, the weighted average number of elements of service composing an index number* was 14; similarly, the average number of elements of service composing an index number on Illinois intrastate traffic was 13.7; and on Indiana intrastate movements, the average number of elements of service composing an index number was 12.4. Or, stated in another way, using the interstate elements of service composing an index number as 100 per cent, Illinois intrastate represents 97.9 per cent and Indiana, 88.6 per cent. From Exhibit 6 (copy attached to this brief as an appendix), it will be noted that that area of the district lying within Indiana represents but 10.3 per cent of the total.

Grain.

The record shows that when the uniform all-commodity basis of rates was established for the first time in the Chicago switching district, in 1911, grain was one of the commodities omitted from the agreement. The record shows that the movement of the grain between points within the Chicago switching district, whether it be state or interstate, is the same as the movement of any other traffic within the district; that such movement has no connection, or is not related, to the line-haul movement, but such movement is a merchandising rather than a transportation problem. The Commission, in its original report, 177 I. C. C. 669, at pages 692 to 695, discusses the situation relative to grain (R. 56 to 59). Exhibit 7-A shows that 435 cars moved in interstate transportation, within the

*All cars moving over a certain route normally receive the same elements of service peculiar to that route. The total cost per car of all elements of service embraced in a given route are combined under an index number. Or, stated in another way, all different services rendered in furnishing transportation from one industry to another, within the district, are combined under one index number for each railroad.

district, on a two-line haul; that the average cost per car was $17.03; that the average revenue per car received by the carriers for such transportation was $10.68. That 1,130 cars moved in two-line hauls, intrastate, within the district, in Illinois; that the average cost per car was $14.16; the average revenue was $10.23. That 31 cars moved in one-line hauls, intrastate, within the district, within Illinois; the average cost was $26.98 per car; the average revenue was $6.30 per car.

Trucking.

The evidence of record shows that the carriers operating in the Chicago switching district have contracts with various trucking companies in the City of Chicago (R. 1185). That the prices these carriers have to pay truckers are materially higher than the rates prescribed by the Commission for rail transportation. The charges made by these truckers range from 6 cents to 15 cents per 100 pounds, minimum 6,000 pounds—these charges do not include loading or unloading of the truck. The truck rates vary with distance. The record also discloses that the cost for trucking an average load of 6.4 tons was $1.56 per ton as compared with the interstate rates within the district of 60 cents, 70 cents and 80 cents per ton for one, two and three-or-more-line hauls respectively (R. 1194-1197). The evidence of record further shows that the commodities now moving by truck are commodities that moved by truck before the interstate rates were increased, December 10, 1931 (R. 647, 707). The evidence shows these movements by truck were principally confined to heavy-loading commodities, such as crushed stone and brick. The movements were further confined to transportation from central yards to the job where the material was to be used; such places were not located conveniently to any railroad track (R. 144). A witness

for complainants in Docket 24950 testified in regard to their trucking charge for handling brick, and testified that the charge was $1.95 per ton for a haul of 16 miles (R. 1299). The trucking for this company formerly was done by contract, but because of the falling off of business, the contractors abrogated the contract and the brick company had to assume the trucking at the figures before stated (R. 1283).

SUMMARY OF ARGUMENT.

I.

The sole issue before the court is whether the order of the Commission of July 3, 1933, directing the removal of the discrimination created by the state rates against interstate commerce, under Section 13 of the Act, is supported by proper findings based upon substantial evidence.

The validity of the Commission's order of July 31, 1931, establishing the reasonableness of the interstate switching rates within the Chicago switching district is not an issue in this case. The order of the Commission of July 3, 1933, dismissing the formal complaint and finding that the interstate rates for switching within the Chicago switching district were not unjust or unreasonable is a negative order and will not be reviewed by this court. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282.

II.

The order of the Commission is a valid exercise of the authority conferred by Section 13, paragraphs (3) and (4), of the Interstate Commerce Act, because it requires the removal of unjust discrimination against interstate commerce growing out of revenue losses caused by substantial disparity between state and interstate rates, which disparity operates as a real discrimination against and obstruction to interstate commerce.

Predicated upon specific findings by the Commission of revenue losses resulting from a substantial disparity between state and interstate rates—which disparity oper-

ates as a real discrimination against and obstruction to interstate commerce—and requiring increases in the state rates to remove an undue burden upon the revenues of the interstate carriers, it is clearly an order of the character authorized by Section 13 (4); that the Act confers authority to issue such order was settled by this court in *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and reiterated in the case of *Florida* v. *United States*, 282 U. S. 194, 215, in which case the court upheld the authority "to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier." Since the latter decision, this court has sustained Section 13 orders in *Georgia Public Service Commission* v. *United States*, 283 U. S. 765; *Alabama* v. *United States*, 283 U. S. 776; *Louisiana Public Service Commission* v. *Texas & New Orleans Railroad Co.*, 284 U. S. 125; *United States* v. *State of Louisiana*, 290 U. S. 70; *Montana* v. *United States*, 290 U. S. decided November 13, 1933; *State of Florida* v. *United States*, decided April 2, 1934. In the last three cases the Commission's orders, like this one, required increases in intrastate rates solely because of unjust revenue discrimination. On account of the frequent references in appellants' brief to Section 3 of the Act, it should be borne in mind that this proceeding is not based upon Section 3, but solely upon Section 13 of the Act, and that the principles involved in Section 3 proceedings are totally different from those covered by actions under Section 13.

III.

The decision and order of the Commission do not contravene the provisions of the Emergency Railroad Transportation Act 1933.

The Emergency Railroad Transportation Act 1933 (c. 91, 48 Stat. 211, approved June 16, 1933), enacted before the order in question was issued, does not adversely affect the validity of the order. The Act seeks "to relieve the existing national emergency in relation to interstate railroad transportation," and amends three sections of the Interstate Commerce Act, including Section 15a, by repealing the Recapture Clause and restating the rule of rate making; but it does not strike down or alter the Commission's authority under Section 13 to remove unjust discrimination against interstate commerce growing out of revenue losses caused by substantial disparity between state and interstate rates which disparity operates as a real discrimination against and obstruction to interstate commerce, and does not rescind or alter the dovetail relation between the provisions of Section 13 and Section 15a. On the contrary, the relationship between the two sections is maintained and the amended Section 15a reenacts the purpose of Congress to provide and maintain "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." *State of Florida, et al.* v. *United States*, decided April 2, 1934.

IV.

The order of the Commission is valid because it was entered only after full hearing as required by the law and is based upon specific findings supported by substantial evidence in numerous hearings in which all of the parties in interest were afforded ample opportunity to be heard.

The transcript of evidence taken before the Commission at the various hearings consisted of more than 3,500 pages of evidence; and 134 exhibits consisting of over 2,000 pages. Many days were consumed in taking evidence. Further, the record shows that all of the controversial questions involved in the cost study were analyzed by a committee consisting of a member each of the two state commissions, the shippers and the carriers. This committee had numerous meetings and analyzed, discussed and placed in exhibit form, 128 controversial questions of fact (R. 938), which ultimately were decided by the Commission. The Commission reached its conclusions after full hearing, and its findings are supported by evidence. The order of July 3, 1933 (R. 168a, 168b) is a valid order. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457.

The courts confine themselves to determining whether the Commission had misinterpreted the statute under which it operates, has violated constitutional rights, or has acted arbitrarily. The court considers the power to make the order and not its wisdom or expediency, and will not substitute its judgment for that of the Commission, nor will the court review the Commission's conclusions of fact by passing upon the credibility of the witnesses, or conflicts in testimony. *Interstate Commerce Commission* v. *U. P. R. R.,* 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. R.,* 215 U. S. 452, 457; *Skinner &*

Eddy Corp. v. *United States*, 249 U. S. 557, 562; *Assigned Car Cases*, 274 U. S. 564, 580.

In the latter case, at pages 580 and 581, the court said:

> "It is not for courts to weigh the evidence introduced before the Commission, *Western Papermakers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States* v. *New River Co.*, 265 U. S. 533, 542. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454."

In *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, this court, at page 482, said:

> "The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361."

Section 16a of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 16a) authorizes the Commission after a decision, order or requirement has been made at any proceeding before it to grant a rehearing upon application by any party "if sufficient reason therefor be made to appear." The Statute further provides that applications for rehear-

ing shall be governed by such general rules as the Commission may establish. Rehearings are granted by the Commission at its discretion if sufficient reason therefor be made to appear.

Unless there is an arbitrary action amounting to a gross abuse of such discretion, the conclusion of the Commission is not subject to review by the courts. Appellants in alleging abuse must show by facts that a rehearing or further consideration asked by them was a matter of right rather than a matter of address to the discretion of the Commission, and that the Commission had no power or authority to deny the petition. The leading case on this subject is *A. T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, generally referred to as the *Grain Case.* The rule applied by the court was based upon an unusual situation and does not apply to every case in which a dissatisfied litigant before the Commission requests a rehearing. *United States* v. *Northern Pacific Railway,* 288 U. S. 490.

The outstanding facts in the *Grain Case* are entirely different than the facts in the instant case, as will be pointed out in the argument on this point. The order fixing the reasonableness of the interstate rates and the level thereof is not before the court.

V.

The order of the Commission is valid because it is based on findings of ultimate fact amply supported by evidentiary facts.

(a). The Commission is not required to find that the increased interstate rates would be or are reasonable, per se, where the complaint is based on a violation of Section 13 (4) of the Interstate Commerce Act, and the facts of record show that the interstate rates had but recently been established as reasonable by order of the Interstate Commerce Commission.

United States v. *State of Louisiana,* 290 U. S. 70.
Georgia Public Service Commission v. *United States,* 283 U. S. 765.
Florida v. *United States,* 282 U. S. 194.
Florida v. *United States,* No. 342, decided April 2, 1934.

(b) The switching service in the Chicago switching district, both state and interstate, is performed under substantially similar circumstances and conditions.

(c) The Commission found as a fact that an increase in the intrastate rates would provide additional revenue for the carriers.

(d) In a case based on Section 13 (4) of the Interstate Commerce Act the law does not require the Commission to find that the intrastate rates as in effect prior to the order of the Commission were less than maximum reasonable rates.

American Express Co. v. *Caldwell,* 244 U. S. 617.
United States v. *Louisiana,* 290 U. S. 70.
Florida v. *United States,* No. 342, decided April 2,

(e) The Commission found as a fact that the existing intrastate switching rates in the Chicago switching district wholly within the States of Illinois and Indiana discriminated against interstate commerce moving interstate in the Chicago switching district in the States of Illinois and Indiana.

(f) The Interstate Commerce Commission under the law and the facts in this case was not required to separate state and interstate movements, revenues, or expenses of the carriers.

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.

Florida v. *United States*, 282 U. S. 194.

Florida v. *United States*, No. 342, decided April 2, 1934.

(g) The Interstate Commerce Commission has jurisdiction under Section 13 (4) of the Interstate Commerce Act as interpreted by this court to order the removal of a revenue discrimination against the carriers caused by discrepancy between state and interstate rates.

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.

Florida v. *United States*, 282 U. S. 194.

Florida v. *United States*, No. 342, decided April 2, 1934.

Georgia Public Service Commission v. *United States*, 283 U. S. 765.

New York v. *United States*, 257 U. S. 591.

Louisiana Public Service Commission v. *Texas & New Orleans Railroad Co.*, 284 U. S. 125.

United States v. *Louisiana*, 290 U. S. 70.

Alabama v. *United States*, 283 U. S. 776.

VI.

The Commission is not required in a case based upon Section 13 (4) of the Interstate Commerce Act, involving a revenue discrimination, as it is required in a case involving Section 3 of said Act, to state definitely and precisely which carriers are subject to the terms of the Commission's order.

VII.

The order of the Commission is valid because it is based upon findings predicated upon evidence amply sufficient to support such order under Section 13 (4) of the Act.

VIII.

Under the facts, circumstances and the law applicable to this case, the Commission in its findings and order was not required to accord any different treatment to grain than to any other commodity.

IX.

The rates on intrastate and interstate traffic within the Chicago switching district should be the same because there is no real or essential difference between the interstate service and the intrastate service.

X.

The court below in its decision and order did not contravene the requirements of Equity Rule 70½.

ARGUMENT.

I.

The sole issue before the court is whether the order of the Commission of July 3, 1933, directing the removal of the discrimination created by the state rates against interstate commerce, under Section 13 of the Act, is supported by proper findings based upon substantial evidence.

We point out specifically in Parts IV, V, VII and IX of our Argument, the evidence upon which the findings and order of the Commission were based, and show that this evidence was sufficient and substantial. The Commission's order of July 31, 1931 established the reasonableness of the interstate rates within the Chicago switching district. The appellants took no steps to have this order set aside by a court of competent jurisdiction. The appellants did file a formal complaint against the reasonableness of the interstate rates, which was dismissed by the order of the Commission of July 3, 1933. While we contend that that order is not and could not be an issue here, nevertheless if it should be found to be an issue, it will not be reviewed by this court, because it is a negative order. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282.

It is clear that under Section 13, Paragraph (4) of the Interstate Commerce Act, the reasonableness of interstate rates fixed by the Commission is not an issue; the only issue is whether the rates applicable on intrastate commerce discriminate against the interstate commerce which moves under the reasonable interstate rates.

We are confident that an attack upon the reasonableness of the interstate rates will not be permitted in a collateral proceeding when the reasonableness of such rates has been adjudicated in an original proceeding where all of the parties had their day in court and were afforded a full opportunity to be heard. *Georgia Public Service Commission* v. *United States*, 283 U. S. 765.

II.

The order of the Commission is a valid exercise of the authority conferred by Section 13 (3) and (4) of the Interstate Commerce Act, because it requires the removal of unjust discrimination against interstate commerce growing out of the revenue losses caused by substantial disparity between state and interstate rates, which disparity operates as a real discrimination against and obstruction to interstate commerce.

Predicated upon findings of revenue losses resulting from a substantial disparity between state and interstate rates, which disparity operates as a real discrimination against and obstruction to interstate commerce, and requiring increases in those rates in order to remove an undue burden upon the revenues of interstate carriers, the order in question is clearly one of the character authorized by Section 13 (4). In view of the repeated decisions of this court, it is no longer open to dispute that Section 13 of the Interstate Commerce Act forbids two distinct kinds of discrimination, both caused by intrastate rates unduly low in their relation to interstate rates, as a result of which (1) intrastate shippers and localities obtain an undue preference and advantage while competing interstate shippers and localities suffer a corresponding disadvantage and undue prejudice; (2) the carriers engaged in both interstate

and intrastate commerce, which are compelled to carry the intrastate commerce at inadequate rates, are deprived of revenue to which they are justly entitled. As expressed by Chief Justice Taft, in *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 587, the words of Section 13 (4) "unjust discrimination against interstate commerce" are not tautological of the preceding words prohibiting undue preference or prejudice as between persons or localities but "aptly include a kind of discrimination against interstate commerce which the operation of the new Act for the first time makes important, and which would seriously obstruct its chief purpose," namely unjust discrimination against interstate commerce because of an undue burden upon the revenues of the carriers.

The court on pages 589 and 590, said:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. *Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work.*" (Italics ours.)

All questions concerning the Commission's power and the constitutionality thereof to issue an order solely for the purpose of removing unjust discrimination against interstate commerce were settled by the court's holding in that case, in which the order, though not sustained in its state-wide scope because of discrimination against persons or places alone, was sustained in its entirety as one neces-

sary to remove unjust discrimination against interstate commerce growing out of revenue losses.

The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute.

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.
Arkansas Railroad Commission v. *C. R. I. & P. Ry. Co.*, 274 U. S. 597.
Alabama v. *United States*, 279 U. S. 229.
Florida v. *United States*, 282 U. S. 194.
Georgia Public Service Commission v. *United States*, 283 U. S. 765.
Alabama v. *United States*, 283 U. S. 776.
Louisiana Public Service Commission v. *Texas & New Orleans Railroad Co.*, 284 U. S. 125.
United States v. *Louisiana*, 290 U. S. 70.
Florida v. *United States*, No. 342, decided April 2, 1934.

III.

The decision and order of the Commission do not contravene the provisions of the Emergency Railroad Transportation Act, 1933.

The Emergency Railroad Transportation Act, 1933 (c. 91, 48 Stat. 211, approved June 16, 1933) passed prior to the issuance of the order of July 3, 1933, here reviewed, does not adversely affect the validity of the order and does not alter the Commission's authority to remove unjust discrimination against interstate commerce growing out of revenue losses caused by substantial disparity between state and interstate rates, which disparity operates as a real discrimination against and obstruction to interstate commerce.

This statute, in Title I, enacts provisions "to relieve the existing national emergency in relation to interstate railroad transportation," and in Title II, enacts amendments to Sections 5, 15a and 19a of the Interstate Commerce Act. Section 15a is amended to read as follows:

> "(1) When used in this section, the term 'rates' means rates, fares and charges, and all classifications, regulations and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

The amendments to Section 15a by the Emergency Railroad Transportation Act, 1933, did not in any manner affect the powers of the Interstate Commerce Commission under Section 13 and did not strike down the Commission's authority to remove unjust discrimination against interstate commerce, nor did it rescind or alter the dovetail relation between the provisions of Section 13 (4) and the purpose of Section 15a. The decision of this court in the case of the *State of Florida* v. *United States,* No. 342, rendered April 2, 1934, definitely settles this question.

In the above case, the court said:

> "The purpose of the changes in Section 15a is not left in doubt. They were made with the manifest object of eliminating the provisions for the recapture of excess income of carriers and of revising the rule as to rate making. The requirement imposed by Transportation Act, 1920, for the adjustment of rates according to rate groups was abolished and in substitution the Commission was directed to give due consideration to the factors which are specified in the sec-

tion as amended. Thus the Commission is to consider, among other factors, 'the effect of rates on the movement of traffic;' 'the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service;' and 'the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.'

"Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under Section 13 (4) intact."

IV.

The order of the Commission is valid because it was entered only after full hearing as required by the law and is based upon specific findings supported by substantial evidence in numerous hearings in which all of the parties in interest were afforded ample opportunity to be heard.

The transcript of evidence taken before the Commission at the various hearings consisted of more than 3,500 pages of evidence, and 134 exhibits consisting of over 2,000 pages.

Many days were consumed in taking evidence. Further, the record shows that all of the controversial questions involved in the cost study were analyzed by a committee consisting of a member each of the two state commissions, the shippers and the carriers. This committee had numerous meetings and analyzed, discussed and placed in exhibit form, 128 questions of fact (R. 938). The result of the committee's studies was embodied in Exhibits 83 and 84 which were introduced and received as evidence. The Commission reached its conclusions after full hearing and its findings are supported by evidence. The order of July 3, 1933 (R. 168a, 168b) is a valid order. *Manufacturers Railway Company* v. *United States*, 246 U. S. 457.

The court confines itself to determining whether the Commission has misinterpreted the statute under which it operates, has violated constitutional rights, or has acted arbitrarily. The court considers the power to make the order and not its wisdom or expediency, and will not substitute its judgment for that of the Commission, nor will the court review the Commission's conclusions of fact by passing upon the credibility of the witnesses, or conflicts in testimony. *Interstate Commerce Commission* v. *U. P. R. R.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 457; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; *Assigned Car Cases*, 274 U. S. 564, 580.

In the latter case, at pages 580 and 581, the court said:

> "It is not for courts to weigh the evidence introduced before the Commission, *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States* v. *New River Co.*, 265

U. S. 533, 542. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454."

In *Manufacturers Railway Company* v. *United States,* 246 U. S. 457, the court discusses the law and at page 482, among other things, said:

> "The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative and this cannot be done. *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361."

Section 16a of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 16a) authorizes the Commission after a decision, order or requirement has been made at any proceeding before it, to grant a rehearing upon application by any party "if sufficient reason therefor be made to appear." The Statute further provides that applications for rehearing shall be governed by such general rules as the Commission may establish. Rehearings are granted by the Commission at its discretion if sufficient reason therefor be made to appear.

The granting or denial of a petition for rehearing and reconsideration in the ordinary case is a matter for the sound discretion of the tribunal to which the petition is addressed. Unless there is an arbitrary action amounting to a gross abuse of such discretion, the conclusion of the Commission is not subject to review by the courts. Ap-

pellants in alleging abuse must show by facts that a rehearing or further consideration asked by them was a matter of right rather than a matter of address to the discretion of the Commission, and that the Commission had no power or authority to deny the petition. The leading case on this subject is *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 284 U. S. 248, generally referred to as the *Grain Case*. The decision in that case turned upon a single point, namely—that the railroads' petition to the Commission was in the nature of a supplemental bill rather than an ordinary petition for rehearing. The denial of the petition in the *Grain Case* was not within the permitted range of the Commission's discretion but was a denial of right. The rule applied by the court was based upon an unusual situation and does not apply to every case in which a dissatisfied litigant before the Commission requests a rehearing. *United States* v. *Northern Pacific Railway Co.*, 288 U. S. 449.

The facts in the *Grain Case* were entirely different than the facts in the instant case. In the *Grain Case* it was shown that a period of more than two years had elapsed since the record closed, that a severe depression had set in after the record closed, and that the carriers had been deprived of an opportunity to present such facts to the Commission. In the instant case the record shows that the hearing in the original case, 177 I. C. C. 669, was closed in September, 1928. The case was briefed and argued before the full Commission. A decision was rendered July 31, 1931. After the decision, a petition by protestants (appellants here) was filed requesting that the order be set aside and the case reopened for further hearing. This petition was denied by the Commission October 12, 1931 (R. 139).

On November 2, 1931, Docket 19610 was reopened for further hearing with respect to the relation of rates

and charges for switching intrastate commerce to the rates prescribed for like switching by the Commission's order of July 31, 1931. Formal complaint was filed on December 28, 1931, by the Acme Steel Company and others (appellants here) alleging that the interstate rates for switching within the Chicago switching district, effective December 10, 1931, were unreasonable in violation of Section I of the Interstate Commerce Act. This complaint was given Docket 24950. Pending the hearing in the reopened Docket 19610, and the hearing on the reasonableness of the rates in Docket 24950, the protestants and complainants (appellants here) filed petitions, dated January 28, February 3 and February 18, 1932, asking that the carriers be required to make a new and more elaborate cost study. These petitions were denied by the Commission. Hearings were had in May, 1932, on reopened Docket 19610 and Docket 24950. The complainants in Docket 24950 contended that the interstate rates and minimum weights established by authority of the Commission's order of July 31, 1931 were "greater than the traffic will bear and were and are unjust and unreasonable in violation of Section I of the act." (195 I. C. C. 92) (R. 140) The details of the cost study, the formula used in connection therewith, and the criticism of the carriers, the shippers, and the representatives of the Illinois and Indiana State Commissions, are set forth at length in the first report and decision of the Commission (177 I. C. C. 669) (R. 33-84); "Similar criticisms" as were offered at the original hearing "were again advanced at the further hearings." (195 I. C. C. 92) (R. 140) The complainants in Docket 24950 (appellants here) pointed out "that the prior record was closed on September 21, 1928 and contended that the test periods within which the unit costs were determined should have been made on all of the thirty-five switching carriers operating within the District, and for a longer and more recent pe-

riod of time in order to bring the study down to date." (195 I. C. C. 92) (R. 140)

The complaint case and the reopened Docket 19610 were heard separately, but "in order to prevent repetition and to conserve the records it was stipulated that any pertinent or relative testimony in the record in one case should be considered as a part of the record in the other case." (195 I. C. C. 91) (Rec. 139) The case was briefed, a proposed report served, and exceptions to the proposed report were filed by the interested parties, and the case was orally argued before the full Commission. The decision of the Commission was rendered July 3, 1933. On August 15, 1933, the protestants and complainants before the Commission (appellants here) petitioned the Commission to reopen the case for further hearing and asked that the order of July 3, 1933, be set aside. This petition was denied.

The reasonableness of the switching rates established by the Commission's order of July 31, 1931, was the sole issue involved in Docket 24950. The hearings in Docket 24950 and reopened Docket 19610 brought the record down to date with respect to all issues involved including the reasonableness of the interstate switching rates.

The record in the instant case shows that due to the depression, traffic had materially decreased in volume unaccompanied by a proportionate decrease in operating expenses, and that "the decrease in tonnage has resulted in increasing their unit cost due to the fact that units of traffic have greatly decreased, with no opportunity to reduce operating expenses correspondingly on account of the irreducible minimum having been reached;" (195 I. C. C. 97) (R. 145); and that "a decrease in volume of traffic unaccompanied by a proportionate decrease in operating expenses would cause unit costs to increase rather than diminish." (195 I. C. C. 97) (R. 145) The record further

shows "that the total operating expenses per car handled increased from $3.86 in 1928 to $4.04 in 1931." (195 I. C. C. 98) (R. 146)

The record further shows that the total operating revenues of the eight switching roads involved in the cost study and including the Chicago River & Indiana Railroad "for the year 1931 were approximately $10,500,000 less than for the year 1928, whereas, the total operating expenses in 1931 for the same roads were only $5,500,000 less than in 1928." (195 I. C. C. 98) (R. 146)

Appellants cannot be heard to say that the Commission abused its discretion in denying their petition for reargument and reconsideration, or in denying their motions for a new and more elaborate cost study. The order of the Commission of July 31, 1931, establishing the reasonableness of the interstate rates became effective December 10, 1931. No court action to test the validity of the order of July 31, 1931, was brought and that order is not complained of here. The record upon which the reasonableness of the rates was established was brought down to date through the filing of the formal complaint Docket 24950. The complainants cannot be heard to complain that the record is stale, since, through the complaint filed by them and through the reopening of Docket 19610, the record was brought down to date by their additional evidence and the additional evidence of the appellee carriers. There can be no question but that if a new cost study had been developed, it would have shown increased costs and warranted higher rates than those established by the Commission.

V.

The order of the Commission is valid because it is based on findings of ultimate fact amply supported by evidentiary facts.

(a) THE COMMISSION IS NOT REQUIRED TO FIND THAT THE INCREASED RATES WOULD BE OR ARE REASONABLE PER SE, WHERE THE COMPLAINT IS BASED ON A VIOLATION OF SECTION 13 (4) OF THE INTERSTATE COMMERCE ACT AND THE FACTS OF RECORD SHOW THAT THE INTERSTATE RATES HAD BUT RECENTLY BEEN ESTABLISHED AS REASONABLE BY ORDER OF THE INTERSTATE COMMERCE COMMISSION.

The record shows that by the Commission's report and order of July 31, 1931,

> "the rates proposed of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more-line hauls, carload minimum 60,000 pounds, within the Chicago switching district as defined in Appendix A, will not be unreasonable for the future for application on all of the commodities switched within the district, except railway equipment on its own wheels." (177 I. C. C. 712) (R. 76)

This order of the Commission has not been challenged in any court. The record further shows that in the Commission's report and order of July 3, 1933, the Commission found (195 I. C. C. 89, 108) (R. 156):

> "That the assailed interstate switching rates of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more-line hauls, and the carload minimum weight of 60,000 pounds, applicable within the Chicago switching district and between the district and Chicago Heights, Ill., are not unjust or unreasonable."

In the case of *Georgia Public Service Commission, et al.* v. *United States,* 283 U. S. 765, at page 770, this court said:

> "It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. *State Corporation Comm.* v. *Aberdeen & Rockfish R. Co.,* 136 I. C. C. 173, 180. But the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings; and at those hearings the Georgia Commission and the Highway Board were represented. Nearly 18 months had elapsed since the original order, but no evidence was offered at the supplemental hearing to show that conditions had so changed since the interstate rates were prescribed as to require reconsideration of the issue. The appellants' objection to the procedure is unfounded."

In the instant case, the reasonableness of the interstate rates was established by the order of the Commission of July 31, 1931. The appellants were represented at the hearing in which the reasonableness of the interstate rates was established. Furthermore, five months after the order of the Commission establishing the reasonableness of the interstate rates was issued—and but 19 days after the interstate rates became effective—a formal complaint (Docket 24950) was filed, attacking the reasonableness of the interstate rates, and at the supplemental hearing in Docket 19610 and the hearing in formal complaint Docket 24950, the Commission found that the interstate rates "are not unjust or unreasonable." (195 I. C. C. 108) (R. 156) See: *United States* v. *Louisiana,* 290 U. S. 70; *Florida* v. *United States,* 282 U. S. 194; *Florida* v. *United States,* No. 342, decided April 2, 1934.

(b) SWITCHING SERVICE IN THE CHICAGO SWITCHING DISTRICT BOTH STATE AND INTERSTATE IS PERFORMED UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

The evidence before the Commission shows "that the traffic is handled in the same trains"; (195 I. C. C. 112) (R. 160) that "the business is moved in regular transfer trains consisting of cars for both interstate and intrastate movements, operated under full crews with the air coupled up and supplied with cabooses, and both road haul and switching business is handled in the same trains." (195 I. C. C. 100) (R. 148) The evidence shows that the record did not disclose "any difference in the conditions surrounding the handling of the interstate and intrastate movements." (177 I. C. C. 711) (R. 75) The cars are handled both in state and interstate switching by the same train, by the same crew, through the same yard, and at the same time.

The evidence shows also that the trains handling the traffic within the Chicago Switching District, the manner of assembling and operating the trains, and the manner of handling carload freight, were comparable to the handling of similar freight in road-haul service. All these services are performed by the carriers whether the traffic is state or interstate (R. 956, 965). Appellants admitted that the switching movements within the Chicago Switching District are performed in substantially the same manner as road-haul movements, that state and interstate traffic within the district is handled in the same trains, and that there is no distinction made between the handling of state and interstate traffic (R. 1002).

(c) THE COMMISSION FOUND AS A FACT THAT AN INCREASE IN THE INTRASTATE RATES WOULD PROVIDE ADDITIONAL INCOME FOR THE CARRIERS.

On page 118 of the Commission's report in 195 I. C. C. (R. 166) the Commission made the following finding:

> "While the evidence shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that, therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipe-line movement, the record nevertheless is convincing *that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find.*" (Italics ours.)

The evidence of record shows that the Commission established for interstate application, a rate of 3 cents per 100 pounds for 1-line hauls; 3.5 cents for 2-line hauls; and 4 cents for 3-or-more-line hauls, minimum 60,000 pounds (177 I. C. C. 712) (R. 76); that by reason of the refusal of the Illinois Commerce Commission and the Public Service Commission of Indiana to permit the carriers to place the rates in Illinois and Indiana, within the district, on the same basis as interstate rates, a lower basis of rates applied on intrastate commerce within Illinois and within Indiana, within the district, than at the same time applied on interstate commerce. These lower rates were 2.5 cents per 100 pounds for 1 or 2-line hauls; 3 cents for 3-or-more-line hauls; minimum 60,000 pounds.

The record shows "a constructive annual loss in revenue resulting from the lower intrastate rates required to be maintained under the orders of the Illinois and Indiana State Commissions. This loss is measured by the differ-

ence between the revenue which would have accrued on the intrastate traffic of September, 1926, under interstate rates as increased December 10, 1931, and the prevailing intrastate rates. The traffic moving in September, 1926, is used as representative because it was the basis for the cost data presented in the original case. The estimated annual difference in revenue within Illinois amounts to $2,683,981, within Indiana, $94,244 and between the Chicago switching district and Chicago Heights $86,732, a total of $2,864,957." This "is the amount by which interstate commerce would be unduly burdened under normal business conditions." (195 I. C. C. 116) (R. 164)

Studies were also introduced in evidence showing the difference in revenue between interstate and intrastate rates based upon traffic moving during the weeks of November 9 to 15, 1931, and January 11 to 17, 1932. These two weeks represented periods prior and subsequent to the increase of interstate rates on December 10, 1931. Based upon intrastate switching traffic moving "within the district for the week of November 9 to 15, there is shown a difference in revenue of $11,731 per week, or an estimated annual loss of $1,011,369; on the basis of the traffic of January 11 to 17 the difference would amount to $9,556 per week, or an estimated annual loss of $985,181." (195 I. C. C. 116) (R. 164) "Based upon traffic which moved intrastate between the district and Chicago Heights for the week of November 9 to 15, the difference in revenue amounted to $535, or an estimated annual loss of $46,152; and for the period January 11 to 17 there is shown a loss of $562, or a net annual loss of $57,979. These constructive differences amount annually to $1,057,521 based upon the traffic handled during the week of November 9 to 15, and to $1,043,160 based upon the traffic moving during the period January 11 to 17." (195 I. C. C. 116) (R. 164)

The record further shows that because of the lower intrastate rates within the Chicago switching district; shippers are routing their shipments so as to have said shipments move over state routes (Ex. 110; R. 952). The record discloses that the normal and customary routes for such shipments between points within the Chicago switching district are interstate routes. The exhibit of record "shows that during the period December 10, 1931, to March 31, 1932, 856 cars were specifically routed and moved over the lower rated intrastate routes which formerly would have moved over interstate routes," (195 I. C. C. 113) (R. 161). Such action in routing the shipments resulted in a loss in revenue of $7,656. The requirements and demands of the intrastate shippers to so handle their shipments as to protect the lower state rates, interfered with the normal and customary manner of handling business within the Chicago switching district and required one of the carriers alone to perform eight and one-half engine hours per day over and above what would be required if the shipments were handled over interstate routes within the district (R. 981).

The record further shows that the switching cost alone was materially greater in handling the car via state routes in order to protect the shipper's request for state movement. If the car (in one of the illustrations in Exhibit 110) had moved over the natural, ordinary and customary route, it would have moved interstate and the switching cost alone for that movement would have been $10.44; but in order that the shipment might be moved wholly within the State of Illinois and thus secure the advantage of the lower state rate, the switching cost alone over the route the car actually moved was $21.78 (R. 955). The demands of the shippers to route their traffic within the district over state routes are due to the fact that the state rate is .5 cents per 100 pounds lower on 1-line hauls, 1 cent

lower on 2-line hauls, and 1 cent lower on 3-or-more-line hauls, minimum 60,000 pounds, than are the interstate rates.

(d) IN A CASE BASED UPON SECTION 13 (4) OF THE INTERSTATE COMMERCE ACT, THE LAW DOES NOT REQUIRE THE COMMISSION TO FIND THAT THE INTRASTATE RATES AS IN EFFECT PRIOR TO THE ORDER OF THE COMMISSION WERE LESS THAN MAXIMUM, REASONABLE RATES.

The interstate rates of 3 cents, 3.5 cents and 4 cents for 1-line, 2-line and 3-or-more-line hauls, respectively, minimum 60,000 pounds, had been prescribed as reasonable rates in its order of July 31, 1931 (177 I. C. C. 669, 712) (R. 76), and found not unjust or unreasonable in its order of July 3, 1933 (195 I. C. C. 89, 108) (R. 156), the order here under review. Therefore the law does not, under such facts, require the Commission to pass upon the reasonableness of intrastate rates that cause unjust discrimination against interstate commerce under Section 13, (4) of the Act.

In the case of *United States* v. *Louisiana*, 290 U. S. 70, this court said:

> "In the Fifteen Per Cent Case, 1931, the Commission, after a careful survey, found itself faced with an acute emergency calling for prompt action to give temporary financial relief to the transportation system. The Commission's report amply discloses that the reasonableness of the rates as generally applied was a controlling consideration in fixing the varying amount of the surcharges and in selecting the particular items to bear them. This is manifested in its conclusion that 'the freight articles selected by us in this connection were those for the transportation of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates.' It was neces-

sary, under the circumstances, that the increases take effect without suspension, but this was done subject to the proviso that 'the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedule of rates, as provided by the Act.' The Commission's action complied with Sec. 15a, see New England Divisions Case (*Akron, C. & Y. R. Co.* v. *United States*) *supra* (261 U. S. 197; 67 L. Ed. 612, 43 S. Ct. 270)."

The finding that discrimination exists and the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable, both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277.

The reasonableness of the interstate rates had been found by the Commission; unjust discrimination against interstate commerce had been found by the Commission; the law forbids unjust discrimination against interstate commerce. To remove this unjust discrimination against interstate commerce the state rates were required to be raised. Neither law nor necessity requires the Commission to pass upon each individual intrastate rate, nor upon the intrastate rates as a whole, with respect to reasonableness.

(e) THE COMMISSION FOUND AS A FACT THAT THE EXISTING INTRASTATE SWITCHING RATES IN THE CHICAGO SWITCHING DISTRICT WHOLLY WITHIN THE STATES OF ILLINOIS AND INDIANA, DISCRIMINATED AGAINST INTERSTATE COMMERCE MOVING INTERSTATE IN THE CHICAGO SWITCHING DISTRICT IN THE STATES OF ILLINOIS AND INDIANA.

On page 118 of the Commission's decision (195 I. C. C. 89) (R. 166), the Commission found:

"We further find that the transportation conditions throughout the Chicago Switching District are sub-

stantially similar; that they are not more favorable for intrastate movements than for interstate movements between the switching district and Chicago Heights; * * * that the maintenance of such lower intrastate rates results and will for the future result in unjust discrimination against interstate commerce."

The record shows (R. 162) that all parties agree that switching movements within the district are handled by trains similar to trains in road-haul service and that interstate traffic and intrastate traffic are handled alike in those trains. The record shows "that many of the industries cannot ship to points within the district except over interstate routes and therefore must pay the interstate rates of 3, 3.5 and 4 cents for one, two and three-or-more-line hauls, respectively, while the industries which have intrastate routes available, may ship on the basis of 2.5 cents for 1-line and 2-line hauls, and 3 cents for 3-or-more-line hauls, in carloads minimum 60,000 pounds, and in some instances at lower rates, but usually with higher minima, because of the exceptions under the Lowrey rates applicable on intrastate traffic." (195 I. C. C. 112) (R. 160)

The record further shows that the shippers were taking advantage of the lower state rates and specifically routing their shipments so that the same would move over state routes (R. 161, 951, 952).

The record shows "that during the period December 10, 1931, to March 31, 1932, 856 cars were specifically routed and moved over the lower rated intrastate routes, which formerly would have moved over interstate routes," (195 I. C. C. 113) (R. 161), and by reason of this action on the part of the shippers and the lower state rates the carriers lost in revenue $7,656 (R. 161 and 952).

The record further shows that since the interstate rates were increased on December 10, 1931, the percentage of

intrastate movements within the district and between the district and Chicago Heights has increased (R. 162).

Exhibits of record show "the ratios, in percentages, of the interstate and intrastate traffic for the week of November 9 to 15, 1931, prior to the effective date of the increases, as compared with the week January 11 to 17, 1932, which was subsequent to the time the interstate increases became effective." (195 I. C. C. 114) (R. 162) These exhibits show that for the composite one, two and three line hauls in Illinois, for the November week, the percentage was 35.39 per cent; for the January week, this percentage had increased to 38.63; in Indiana, the November week showed 7.08 per cent, while for the January week it showed 8.12 per cent. The combined intrastate traffic for both Illinois and Indiana showed for the November week, 42.47 per cent, while for the January week, this percentage had increased to 46.75. The interstate traffic shows the reverse. For the November week, it was 57.53 per cent, while for the January week it was 53.25 per cent. With reference to the traffic between the Chicago switching district and Chicago Heights, the November week showed that the intrastate traffic amounted to 52.93 per cent of the total, while for the January week, this percentage had increased to 71.38. On the other hand, the interstate traffic showed that the November week was 47.07 per cent, while for the January week this percentage had decreased to 28.62 (R. 162).

The revenue loss to the carriers by reason of the lower state rates is shown of record (R. 164).

Based upon the traffic moving in September, 1926, the loss to the carriers based upon the difference between the intrastate rates and the interstate rates, on an annual basis, amounts to $2,864,957. Based upon the tonnage that moved between November 9 to 15, 1931, allocated to an annual basis, the revenue loss is $1,057,521. Based upon

the traffic that moved January 11 to 17, 1932, allocated to an annual basis, the loss amounts to $1,043,160.

There can be no question but that the Commission found that the state rates within the Chicago switching district cause discrimination against interstate commerce and that the facts of record amply support such a finding.

(f) THE INTERSTATE COMMERCE COMMISSION, UNDER THE LAW AND THE FACTS OF THIS CASE, WAS NOT REQUIRED TO SEPARATE STATE AND INTERSTATE MOVEMENTS, REVENUES OR EXPENSES OF THE CARRIERS.

The evidence of record shows that the Chicago switching district is "approximately 40 miles in length and from 7 to 15 miles wide, and is densely populated. It covers an area larger than any other switching district in the country, comprising over 600 square miles and is served by 35 railroads, which maintain a network of more than 5,000 miles of track within the boundaries of the district." (177 I. C. C. 675-6) (R. 39, 40) The district is honeycombed by a network of tracks and sidetracks over which the switching under consideration is performed.

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> "embrace all of the 69 commodity groupings into which the traffic has been classified. In each of the groups are involved both interstate and intrastate movements. * * * The interstate rates apply on an all-commodity basis, the same rate and minimum weight applying to each commodity, depending, of course, on the number of lines involved in the movement, but irrespective of differences in the length of haul." (195 I. C. C. 108-9) (R. 156-7)

> "The shippers and receivers of freight within the district generally declared that the basis of rates should be the same throughout the district for interstate and intrastate movements, some contending, however, that the level should not exceed the present

intrastate rates, while others urged that the same level be maintained, provided the all-commodity basis would not exceed 2.5, 3, and 3.5 cents for the one, two and three-or-more-line movements respectively. The evidence discloses that the traffic, both interstate and intrastate, is handled in the same trains, by the same train crews, and in the same manner." (195 I. C. C. 109) (R. 157)

The witness for the Chicago Association of Commerce testified (R. 534-5):

"Unless a uniform basis applies throughout the district, centralization of manufacturers and distributors adjacent to the source of supply will result and cause congestion and increased cost to those sections, with a loss of traffic and depreciation of property values in other sections. Many industries are now at points removed from the congested areas. A forecast of the relocation of industries and loss of investment that would result from subdividing the district is impossible."

The witness for the Chicago Retail Lumber Association testified (R. 709-10):

"The lumber interests favor the all-commodity basis in the Chicago district and are satisfied with the present rates."

The witness for the grain interests testified (R. 700):

"As to zoning, a study of Mr. Haynes' map indicates it is an impossible thing."

The witness for the By-Products Coke Corporation testified (R. 565):

"As far as our own company is concerned, considering our immediate selfish interests alone, I would not object to a zoning system but as to the interests of the entire industrial community any zoning system would certainly be injurious to Chicago and its indus-

tries. What Mr. Haynes has said with reference to maintenance of a uniform system throughout the whole district meets my approval."

The witness for the Consumers Company testified (R. 608):

"Zoning the district would create discrimination, because industries in the same line of business are located on the north side, the west side or the south side, and in many cases right in the loop. The dealers in sand, gravel and stone are all over the district, and a line could not be drawn anywhere without creating discrimination against certain localities and as between certain carriers."

From the above it is apparent that the desire of the litigants was for a uniform rate throughout the district and the Commission, under its administrative power, has the right to determine the nature of the rate to apply to the territory or district under consideration, that is, as to whether the rate should be a mileage rate or a group rate, and whether such rate should apply to all of the commodities or to only certain of the commodities that move within the district under review. And in establishing an all-commodity rate as the switching charge to apply within the district, such charge applies "to any haul within the switching district no matter how long or how short it may be,". Furthermore,

"switching charges are largely based on average conditions. In every switching district there will almost invariably be found some hauls so long and some so difficult that the cost is in excess of the switching charge collected, but that fact does not show the charge to be less than reasonable, for the question is whether the carrier is receiving adequate compensation for the total switching service rendered within the district." (195 I. C. C. 115) (R. 163)

Under the conditions as we have described them above, if the intrastate switching rates within the district cause unjust discrimination against interstate commerce under Section 13 (4), the Commission has the authority to order the state rates increased: *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R.*, 257 U. S. 563; *Florida* v. *United States*, 282 U. S. 194; *Florida* v. *United States*, No. 342, decided April 2, 1934; *United States* v. *Louisiana*, 290 U. S. 70. And in so ordering, it is not necessary, nor is it required that there be a separation between state and interstate movements, revenues, or expenses of the carriers. The case of *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, cited by appellants, deals with a confiscation case and is not controlling or in point with reference to the issue here involved. It does not deal with discrimination against interstate commerce caused by state rates.

(g) THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION UNDER SECTION 13 (4) OF THE INTERSTATE COMMERCE ACT AS INTERPRETED BY THIS COURT, TO ORDER THE REMOVAL OF A REVENUE DISCRIMINATION AGAINST THE CARRIERS CAUSED BY A DISCREPANCY BETWEEN STATE AND INTERSTATE RATES.

That Congress has authorized the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce cannot be disputed:

Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.*, 257 U. S. 563;

Georgia Public Service Commission v. *United States*, 283 U. S. 765;

Alabama v. *United States*, 283 U. S. 776;

New York v. *United States*, 257 U. S. 591;

Louisiana Public Service Commission v. *Texas & New Orleans Railroad Co.*, 284 U. S. 125;

United States v. *Louisiana,* 290 U. S. 70.
Florida v. *United States,* No. 342, decided April 2, 1934.

In the case of *United States* v. *Louisiana,* 290 U. S. 70, it is stated:

> "By Sec. 416 of the Transportation Act, Sec. 13 (4), Interstate Commerce Act U. S. C. Title 49, Sec. 13, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This court has consistently held that this section is to be construed in the light of Section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of Section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return."

VI.

The Commission is not required in a case based upon Section 13 (4) of the Interstate Commerce Act involving a revenue discrimination, as it is required in a case involving Section 3 of said Act, to state definitely and precisely which carriers are subject to the terms of the Commission's order.

All of the carriers operating in the Chicago switching district are subject to the Interstate Commerce Act, and handle interstate commerce, and are parties to and subject to the Commission's order requiring the unjust discrimination against interstate commerce to be removed by increasing the state rates to the level of the interstate rates found reasonable by the Commission. There can be

no question but that the unjust discrimination against interstate commerce found by the Commission applies to each of the roads within the Chicago switching district and it is not required, nor is it necessary that the Commission in its report and order point out each individual road and each individual instance where unjust dscrimination is created. This court said in the case of *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, at page 587:

> "Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of Sec. 15a to be ascertained pursuant to Sec. 19a of the Interstate Commerce Act (37 Stat. 701; amended 41 Stat. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This is contrary to the construction which since the enactment of Sec. 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of Sec. 15a refutes such interpretation. The percentage is to be calculated on 'the aggregate value of the railway property of such carriers held for and used in the service of transportation.' To impose on the Commission the duty of separating property used in the two services when so much of it is used in both; and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not."

This court further said on page 589:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use

that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce, may therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson* v. *Shaw,* 204 U. S. 24; *Luxton* v. *North River Bridge Co.,* 153 U. S. 525; *California* v. *Central Pacific R. R. Co.,* 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

In the case of *Houston East and West Texas Railway Co.* v. *United States,* 234 U. S. 342, at page 355, this court said:

"It is also clear that, in removing the injurious discrimination against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper, standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

Counsel for appellants has overlooked the distinction between an order of the Commission under Section 13 (4) of the Act requiring said rates to be raised in order to remove an unjust discrimination against interstate com-

merce, and orders of the Commission under Section 3 of the Act requiring removal of discrimination between persons and localities.

The opposing counsel have cited the recent case of *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, which considered an order under Section 3 of the Act dealing with undue preference to New Orleans and undue prejudice to the Texas ports by interstate carriers. State rates were not involved and unjust discrimination against interstate commerce under Section 13 (4) of the Act was not an issue. The case has no application to the one here under consideration. This court pointed out in the case of *Florida* v. *United States,* No. 342, decided April 2, 1934, that:

> "By Transportation Act, 1920 (41 Stat. 484), the Congress granted specific authority to the Commission to remove discriminations against interstate commerce caused by intrastate rates. The Congress amended Section 13 of the Act to Regulate Commerce so as to empower the Commission to confer with state authorities 'with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission.' Sec. 13 (3). And, whenever in the course of its authorized investigations, the Commission after full hearing, finds that any rate, regulation, or practice 'made or imposed by authority of any State' causes 'any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' the Commission is required to prescribe the rate thereafter to be charged, or the regulation or practice thereafter to be observed, in such manner as in its judgment will remove the discrimination. The order of the Commission is to bind the carriers, parties to the proceeding, 'the

law of any State or the decision or order of any State authority to the contrary notwithstanding.' Sec. 13 (4)."

The court further said after citing and quoting from the case of *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563:

"We concluded that these words in Section 13 (4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *United States* v. *Louisiana*, 290 U. S. 70, 75."

VII.

The order of the Commission is valid because it is based upon findings predicated upon evidence amply sufficient to support such order under Section 13 (4) of the Interstate Commerce Act.

The statute requires the Commission to find only the ultimate facts. Section 14 of the Interstate Commerce Act (U. S. Code Title 49, Sec. 14) provides, in paragraph 1:

"Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

It is obvious that under the statute, the Commission is expected to make findings of fact only in the event

damages are awarded. Even in such cases, this Court has pointed out that the Commission is required to find only the ultimate facts and not the evidential facts. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, 427.

In a case such as that here presented, there is no requirement for anything but the conclusion of the Commission, together with its decision, order or requirement in the premises. As a matter of good practice, it is obviously desirable that in making its decision the Commission should give a sufficient statement in addition to its conclusion to inform the parties, and if the case becomes a subject of litigation in the courts, to apprise the court regarding the essential facts and the reasons underlying the Commission's conclusions. This is in accordance with what this court said in *Florida* v. *United States*, 282 U. S. 194.

An examination of the Commission's report in the present case (195 I. C. C. 89) (R. 137), will show that the Commission gave an elaborate and detailed discussion of the facts developed of record before it. The Commission in its prior report (177 I. C. C. 669) (R. 33), found, at page 711, that "the record does not disclose any difference in the conditions surrounding the handling of interstate and intrastate movements." (R. 75)

In the report and order here under review, the Commission found that the evidence of record showed "that the traffic is handled in a manner similar to the road-haul traffic, and that the operation of the switching trains is comparable to road-haul operation. The business is moved in regular transfer trains consisting of cars for both interstate and intrastate movements, operated under full crews with the air coupled up and supplied with cabooses, and both road-haul and switching business is handled in the same trains." (195 I. C. C. 100) (R. 148) The evidence showed that the manner of handling the traffic

within the district was the same in 1932 as in 1927 (R. 148). The prior report, 177 I. C. C. 669, 711 (R. 75) showed "that all of the parties, both shippers and carriers, were practically unanimous in contending for the establishment of an all-commodity basis to apply throughout the Chicago switching district,". At the further hearing, "the shippers and receivers of freight within the district generally declared that the basis of rates should be the same throughout the district for interstate and intrastate movements, some contending, however, that the level should not exceed the present intrastate rates, while others urged that the same level be maintained provided the all-commodity basis would not exceed 2.5, 3, and 3.5 cents for 1, 2, and 3-or-more-line hauls respectively. The evidence discloses that the traffic, both interstate and intrastate, is handled in the same trains, by the same train crews, and in the same manner." (195 I. C. C. 109) (R. 157)

The evidence of record further shows that all witnesses who testified on the subject objected to zoning the district for rate purposes. The witness for the Chicago Association of Commerce testified (R. 534-5):

> "Unless a uniform basis applies throughout the district, centralization of manufacturers and distributors adjacent to the source of supply will result and cause congestion and increased cost to those sections with a loss of traffic and depreciation of property values in other sections. Many industries are now at points removed from the congested areas. A forecast of the relocation of industries and loss of investment that would result from subdividing the district is impossible."

Witnesses for the Chicago Retail Lumber Association (R. 709-10), for the Grain interests (R. 700), for the By-Products Coke Corporation (R. 565) and for the Con-

sumers Co. (R. 608) testified to the same effect as the witness for the Chicago Association of Commerce.

The Commission's report here under review, 195 I. C. C. 89, at pages 92, 93 and 94 (R. 140-142), discusses anew the cost study that was filed in the first case. At page 95 of the report (R. 143), the Commission elaborates on the contention and evidence by the complainants and protestants (appellants here) with reference to "changed conditions enumerated since the prior record was closed"; some of the contentions are: "(1) falling off in the volume of traffic, (2) improvement in the highways within the district resulting in diversion of much additional tonnage from the rail lines for movement by truck, (3) the decline in value of many of the articles or commodities transported, (4) reduction in wages and cost of supplies, and (5) curtailment in the amount of service rendered by the carriers to the industries within the district."

On page 96 of the report (R. 144), the Commission recites the testimony submitted in regard to truck competition. The evidence before the Commission discloses that "with respect to some traffic the carriers could not make rates low enough to regain the traffic from the trucks to the rail lines" and because "of location of the particular buildings under construction at off-track points, the material would of necessity have to be trucked for some distance even though the initial movement would be by rail." And in such instances "it is clear that it is impossible for the rail lines to compete with the movement by truck under any basis of rates." (R. 144)

At pages 97 and 98 of the report (R. 145-146) the change in conditions as affecting the carriers' revenues is discussed. The evidence shows "that the decrease in tonnage has resulted in increasing * * * unit costs due to the fact that units of traffic have greatly decreased with no opportunity to reduce operating expenses correspondingly

on account of the irreducible minimum having been reached. In other words, a decrease in volume of traffic, unaccompanied by a proportionate decrease in operating expense would cause unit costs to increase rather than diminish."

At page 98 (R. 146), the report shows that for eight switching roads "the total operating expenses per car handled increased from $3.86 in 1928 to $4.04 in 1931." That the operating ratio for these roads increased from 66.97 per cent in 1928 to 74.11 per cent in 1931. The report shows that for nine railroads operating in the Chicago switching district, the total operating revenues "for the year 1931 were approximately $10,500,000 less than for the year 1928, whereas the total operating expenses in 1931, for the same roads, were only $5,500,000 less than in 1928."

At pages 98, 99 and 100 (R. 146-148), the report discusses the comparison of rates applicable within the district with rates prescribed for road haul and with rates on various commodities.

On page 101 of the report (R. 149) the report discusses the evidence of record with reference to comparison of rates in other switching districts.

On page 102 of the report (R. 150) it is shown that "some of the carriers have contracts with truck companies for trucking between various stations within the switching district, for which they pay charges ranging from 5 cents for 1½ miles to 15 cents per 100 pounds for 17 miles, but these charges do not include loading and unloading." Comparisons were made of record "of the similarity of the trucking conditions within Chicago and the St. Louis, Mo. districts." "A cost study made within the St. Louis district developed road-haul costs of $1.014 per ton for average hauls of 2.13 miles, and that with the addition of the

loading and unloading charges, clerical costs, etc., the total cost for an average load of 6.4 tons amounted to $1.56 per ton."

On pages 103 and 104 of the report (R. 151), the evidence with reference to sand, gravel, and crushed stone is discussed.

On pages 104 and 105 (R. 152-153), the evidence with reference to grain and grain products, coal, plant refuse, and other commodities, is discussed.

On pages 107 and 108 (R. 155-156) the evidence with reference to Chicago Heights, Illinois, and evidence with reference to minimum weights is discussed.

On page 108 of the report (R. 156) is set forth the finding of the Commission

> "that the assailed interstate switching rate of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more-line hauls, and the carload minimum weight of 60,000 pounds, applicable within the Chicago switching district and between the district and Chicago Heights, Ill., are not unjust or unreasonable."

At pages 108 to 119 (R. 156-167), the evidence with reference to the Section 13 investigation is considered and discussed.

At page 112 (R. 160) the report points out

> "that many of the industries cannot ship to points within the district except over interstate routes and therefore must pay the interstate rates of 3, 3.5, and 4 cents for one, two, and three-or-more-line hauls, respectively, while the industries which have intrastate routes available may ship on the basis of 2.5 cents for 1-line and 2-line hauls, and 3 cents for 3-or-more-line hauls, in carload minimum 60,000 pounds, and in some instances at lower rates, but usually with higher minima, because of exceptions under the Lowrey rates applicable on intrastate traffic."

On page 113 (R. 161) the report discusses the evidence showing "that during the period, December 10, 1931, to March 31, 1932, 856 cars were specifically routed and moved over the lower rated intrastate routes, which formerly would have moved over interstate routes,". The evidence shows that by reason of the fact that the shippers were shipping via the lower state routes, on the 856 cars referred to above, the revenue loss was $7,656.

On page 114 of the report (R. 162), the evidence with reference to shifting of traffic from interstate to state movements since the increase in the interstate rates on December 10, 1931, is pointed out. On this page of the report, it is pointed out that for the week of November 9 to 15, 1931—which was prior to the effective date of the increase in interstate switching rates—the total of the intrastate traffic in Illinois, for one, two and three line hauls, was 35.39 per cent of the total; while for the week of January 11 to 17, 1932—which week was subsequent to the increase in the interstate rates—this percentage had increased to 38.63. In Indiana, the traffic for the week of November, 1931, represent 7.08 per cent of the total, while for the week of January, 1932, this per cent had increased to 8.12.

Interstate traffic shows the reverse situation. For the week of November, 1931, the interstate traffic was 57.53 per cent of the total while for the week of January, 1932, this percentage had decreased to 53.25. The situation with regard to the traffic between the Chicago switching district and Chicago Heights is also shown on this page of the report. The state traffic for the week of November, 1931—prior to the effective date of the increase in the interstate rates—was $52.93 of the total, while for the week of January, 1932, this percentage had increased to 71.38. The reverse of this situation is shown with reference to

interstate traffic; for the week of November, 1931, the interstate traffic was 47.07 per cent of the total, while for the week of January, 1932, this percentage had decreased to 28.62.

On page 115 of the report (R. 163) the evidence in regard to the average hauls, one-line, two-line, and three lines is set forth and it is pointed out that "switching charges differ from line-haul rates in that they are ordinarily not graded in accordance with either the value of the commodity moved or the distance of movement. As a rule they apply to any haul within the switching district no matter how long or how short it may be." The evidence further shows that "the intrastate hauls within the district range from a fraction of a mile to 54 miles, and there are interstate hauls also which range from a fraction of a mile to 68 miles, with one haul shown as approximately 89 miles." (R. 163) The record further shows "that there are many individual intrastate hauls which are longer than many of the interstate hauls." (R. 164)

On pages 116 and 117 of the report (R. 164-165), the constructive annual loss in revenue is set forth in detail, based upon the difference between the intrastate rates and the interstate rates, applied to the traffic that moved in September, 1926, which was the basis for the cost data presented in the original cost study and which period represents normal times. The estimated loss on an annual basis is shown as $2,864,957. The loss of revenue to the carriers by reason of the lower state rates, based on the traffic that moved in the week of November 9 to 15, 1931, on an annual basis, is shown as $1,057,521; and on the basis of the traffic of January 11 to 17, 1932, the loss caused by the low intrastate rates, on an annual basis, is shown as $1,043,160.

After considering the evidence of record and discussing it fully, as stated above, on page 118 (R. 166), the Commission made its findings. The Commission stated:

> "While the evidence shows that the existing competition by motor trucks is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipe line movement, *the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find.*" (Italics ours.)

The further finding of the Commission shows:

> "We further find that the transportation conditions throughout the Chicago switching district are substantially similar; * * * that the maintenance of such lower intrastate rates results and will for the future result in unjust discrimination against interstate commerce." (R. 166.)

There can be no valid contention that the order of the Commission, under Section 13 (4) of the Act is not based upon proper findings and predicated upon substantial evidence.

VIII.

Under the facts, circumstances and the law applicable to this case, the Commission, in its findings and order, was not required to accord any different treatment to grain than to any other commodity.

The record shows that when the uniform all-commodity basis of rates was established for the first time in the Chicago switching district in 1911, grain was one of the commodities omitted from the agreement.

The record shows that the movement of grain between points within the Chicago switching district whether it be state or interstate, is the same as the movement of any other traffic within the district; that such movement has no connection, or is not related to the line-haul movement, but such movement is a merchandising, rather than a transportation problem. The Commission, in its first report, (177 I. C. C. 669, at pages 692-695; R. 56-59) discusses the situation relative to grain.

Exhibit 7-A shows that 435 cars moved in interstate transportation within the district on a two-line haul; that the average cost per car was $17.03; that the revenue received by the carriers for such transportation was $10.68; that 1,130 cars moved in two-line hauls intrastate, within the district in Illinois; that the average cost per car was $14.16; the average revenue was $10.23. The evidence further shows that 31 cars moved in one-line haul intrastate within the district, within Illinois. The average cost was $26.98 per car; the average revenue was $6.30 per car.

The record shows that the purpose of the Commission in instituting Docket 19610, was

> "of inquiry and investigation into and concerning the lawfulness of *all rates and charges* for the switching within the Chicago Switching District of *all carload traffic moving* in interstate commerce, and their relation to like rates and charges for switching in intrastate commerce, with a view to prescribing such reasonable, proper, non-discriminatory, non-prejudicial and otherwise lawful switching rates for said traffic as the facts and circumstances may appear to warrant." (Italics ours) (177 I. C. C. 674; R. 38.)

The grain interests objected to zoning the district. The witness testified (R. 700) "as to zoning a study of Mr. Haynes' map indicates it is an impossible thing."

The principal contention of the grain interests is that grain had moved on a lower basis generally speaking, than

had been accorded to other commodities and that this condition should continue to exist.

The report of the Commission shows that careful consideration was given to the contention of the grain interests and upon the facts the Commission did not find any justification for continuing these exceptions in regard to grain, and therefore made no exceptions in this respect; but from the facts of record, as above pointed out, the Commission's order is a valid and lawful order.

IX.

The rates on state and interstate traffic within the Chicago switching district should be the same because there is no essential difference between the interstate service and the intrastate service.

The switching charges are largely "based on average conditions. In every switching district there will almost invariably be found some hauls so long and so difficult that the cost is in excess of the switching charge collected, but that fact does not show the charges to be less than reasonable, for the question is whether the carrier is receiving adequate compensation for the total switching service rendered within the district." These switching charges "differ from line haul rates in that they are ordinarily not graded in accordance with either the value of the commodity moved or the distance of movement." (195 I. C. C. 115) (R. 163) Practically all parties "were of one accord that one level of rates should apply throughout the district on both interstate and intrastate movements." (R. 164)

The record further shows that the Chicago Association of Commerce, the Retail Lumbermen's Association, the Grain interests, the By-Products Coke Corporation, and

the Stone interests (R. 534, 565, 608, 700, 709) were opposed to zoning. Therefore in establishing an all-commodity basis, which is the equivalent to a postage-stamp rate, average conditions had to be made controlling.

The Commission has the authority and power to determine the basis of rates that is best fitted to serve the territory under consideration. In considering the average conditions prevailing throughout the Chicago switching district, all factors had to be, and were, given consideration. In determining charges in a switching district, distance is but a minor factor. The average miles of one-line, two-line and three-line hauls, within the district, both state and interstate, necessarily differ because of the fact that the interstate includes the district as a whole while the intrastate is only a portion of the whole. In determining the cost of performing switching service in the Chicago switching district, the record shows that the different elements of service were determined, and that the element of distance as representing a service was the least important of all of the elements of service rendered, as is exampled in the transfer service. The record shows, by computations from Exhibits 90 and 91, that of the four railroads of the Chicago switching district that cross the state line, namely, the Baltimore & Ohio Chicago Terminal Ry., the Elgin, Joliet & Eastern Ry., the Indiana Harbor Belt Ry. and the Pennsylvania Railroad— all four of which were used in the cost study— the elements of service on both state and interstate traffic are practically the same. The weighted average number of elements of service composing an index number* for interstate traffic was 14; similarly the average number of elements of service com-

*All cars moving over a certain route normally receive the same elements of service peculiar to that route. The total cost per car of all elements of service embraced in a given route are combined under an index number. Or, stated in another way, all different services rendered in furnishing transportation from one industry to another, within the district, are combined under one index number for each railroad.

posing an index number on Illinois intrastate traffic was 13.7; on Indiana intrastate movements, the average number of elements of service composing an index number was 12.4. Stated in another way, using the interstate elements of service composing an index number as 100 per cent, Illinois intrastate represents 97.9 per cent and Indiana, 86.6 per cent. From Exhibit 6 (copy attached to this brief as an appendix), it will be noted that the area of the district lying within Indiana represents but 10.3 per cent of the total; yet the record shows that almost 50 per cent of the traffic that is handled within the district has its origin or destination within Indiana.

The record shows (195 I. C. C. 114) (R. 162) that "the interstate traffic within the district was 40.29 per cent of the entire movement, in September, 1926, the Illinois intrastate movement being 53.31 per cent, and the Indiana intrastate, 6.40 per cent." Using the traffic that moved in the week of November 9 to 15, 1931, the record shows that the interstate traffic equalled 57.53 per cent, while Illinois intrastate traffic equalled 35.39 per cent, and Indiana, 7.08 per cent. And using the week of January 11 to 17, 1932, the record shows that the interstate traffic equalled 53.25 per cent of the total while Illinois intrastate equalled 38.63 per cent, and Indiana, 8.12 per cent.

The record shows that there are single-line, intrastate, hauls within Illinois that are longer than interstate hauls within the district. It is further shown that there are single-line hauls that are longer than two-line hauls, or three-line hauls. This is a natural condition in a switching district the size of the Chicago switching district, and it necessarily follows that under such conditions, if a uniform rate is to apply throughout the district, rates must be based upon average conditions, and since distance is no important factor in the development of a switching cost, and as the record shows the difference in distance is the

only factor considered by appellants, it necessarily follows that all other factors used in determining the cost are practically the same.

X.

The court below in its decision and order did not contravene the requirements of Equity Rule 70½.

Equity Rule 70½ provides:

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

On November 3, 1933, the court below filed its findings of fact and propositions (conclusions) of law. The findings of fact are stated on pages 1307 to 1315 of the record; its propositions (conclusions) of law are separately stated and appear at pages 1315 and 1316 of the record. We do not consider it necessary to point out that Equity Rule 70½ has been complied with since appellants appear to have abandoned this assignment of error, as counsel state on page 161 of their brief:

> "Appellants bring this matter to the attention of the court by assignment of error, but they specifically pray that action by this court shall not extend to a remanding of the case to the district court for special findings of fact and conclusions of law thereon appropriate to the decision as required by Equity Rule 70½, as such action would only result in delay in determining the validity of the Commission's order of July 3, 1933."

CONCLUSION.

The Commission's order of July 3, 1933, is a valid exercise of the authority conferred by Section 13, paragraphs (3) and (4), of the Interstate Commerce Act and the Commission's authority is not affected by provisions of the Emergency Railroad Transportation Act, 1933. The order was entered after a full hearing, as is required by law, and is based on special findings supported by substantial evidence, and was rendered after a full hearing.

The order of the Commission of July 31, 1931, establishing reasonable rates for interstate switching within the Chicago switching district has never been questioned in any court and its validity is not an issue in this case.

The Commssion in its order of July 3, 1933, found that the interstate rates for switching within the Chicago switching district were not unjust or unreasonable, and ordered the formal complaint, Docket 24950, dismissed. This order of the Commission is not an issue here.

The order of July 3, 1933, finding that "the maintenance of such lower intrastate rates results, and will for the future result in unjust discrimination against interstate commerce" is a valid and lawful order.

It is respectfully submitted that the order and decree of the court below, sustaining the validity of the Commission's order and denying the prayer of the Bill of Com-

plaint to enjoin, set aside, annul, and suspend, the Commission's order entered July 3 1933, should be affirmed.

Respectfully submitted.

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J. R. BARSE,
D. P. CONNELL,
J. N. DAVIS,
P. F. GAULT,
WALTER MCFARLAND,
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Attorneys for Carrier Appellees.

Chicago, Illinois,
April 23, 1934.


DES PLAINES
FRANKLIN PARK
MELROSE PARK
BELLWOOD
BROADVIEW
FOREST PARK
HARLEM
GALEWOOD
CRAGIN
CHICAGO
DU PAGE COUNTY
CH

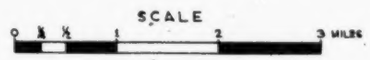
I. C. C. Docket 19610
I. & S. Docket 2900
Exhibit No. 6
Witness SAUER

MAP OF

CHICAGO SWITCHING DISTRICT

AND VICINITY





MICHIGAN

SOUTH CHICAGO

LAKE CALUMET

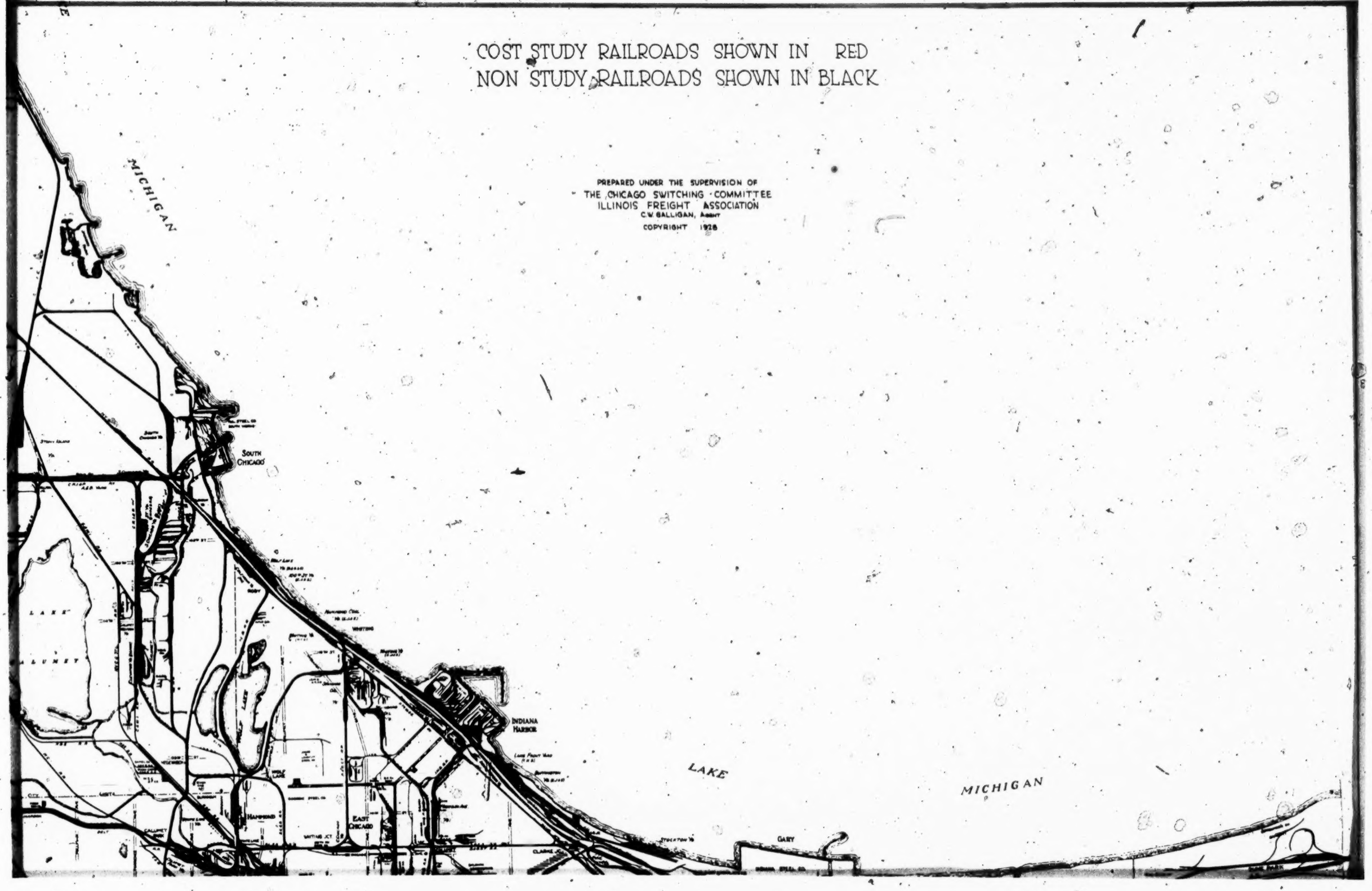
HARVEY JCT.

CHICAGO RIDGE

COOK COUNTY

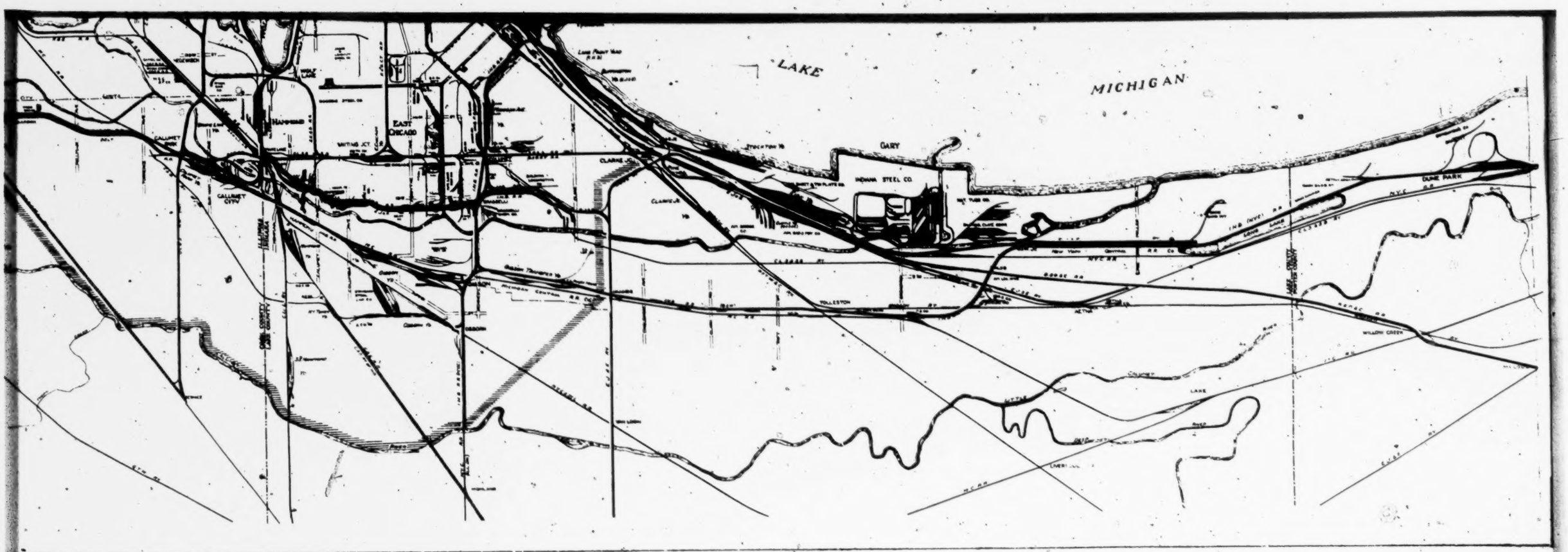
COST STUDY RAILROADS SHOWN IN RED
NON STUDY RAILROADS SHOWN IN BLACK

PREPARED UNDER THE SUPERVISION OF
THE CHICAGO SWITCHING COMMITTEE
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PLANOGRAPHED BY JOHN S. SWIFT CO., CHICAGO, ILL.

APPENDIX B.

The Interstate Commerce Act, as amended by Transportation Act, 1920, (41 Stat. 456) provides:

SECTION 13 (3). Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

SECTION 13 (4). Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination

against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

SECTION 15a. (3). The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to pro-

vide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

By Emergency Railroad Transportation Act, 1933, Section 205, (c. 91, 48 Stat. 211, 220, approved June 16, 1933) section 15a of the Interstate Commerce Act was amended to read as follows:

SEC. 15a. (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

Other pertinent provisions of Emergency Railroad Transportation Act, 1933, are as follows:

SEC. 2. In order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation, there is hereby created the office of Federal Coordinator of Transportation, who shall be appointed by the Presi-

dent, by and with the advice and consent of the Senate, or be designated by the President from the membership of the Commission.

SEC. 10. (a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however,* That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

(b) The Coordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State commission until he has advised the State commission of said State, or the Governor of said State, if there be no such commission, that such order is in contemplation, and shall afford the State commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such order is necessary, in his opinion, to prevent or remove an obstruction to or a burden upon interstate commerce.

SEC. 206. (a) All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and

payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.